(1) Supreme Court, U.S.
FILED
991671 MAR 24 2000
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTINA BREWER, Personal Representative for the Estate of Richard Brewer,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States District Court for the Northern District of California

PETITION FOR A WRIT OF CERTIORARI

Helen T. Dziuba
1250 Standard Plaza
1100 SW Sixth Avenue
Portland, Oregon 97204
(503) 224-3333
Counsel of Record

28pp

QUESTIONS PRESENTED

I. Where the statutory mission of the Coast Guard is to "save lives" and it is publicly funded, equipped, trained and staffed for that mission, and claims expertise in search and rescue, should the Coast Guard be cloaked with "Good Samaritan" immunity, or should the Coast Guard's actions in undertaking a rescue be judged by the same standard as all other actors -negligence **under the circumstances**?

II. Where there is a conflict in the circuits with respect to evaluating Coast Guard liability for a failed rescue (an issue upon which the Supreme Court has never ruled), should this court take review and clarify the applicable standard?

LIST OF PARTIES

Petitioner, Christine Brewer, is the personal representative of her husband's estate, and appears here on behalf of herself and their young child. Defendant is the United States of America because the petitioner's claims arise from the conduct of the United States Coast Guard.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
I. Trial Court Proceedings	4
II. Trial Court Rulings	4
III. The Ninth Circuit Opinion	5
REASONS FOR GRANTING THE WRIT	6
A. THERE IS A CONFLICT IN THE CIRCUITS	6
1. The Fifth Circuit Applies a Negligence Standard.	6
2. Even the Ninth Circuit recognizes a duty to exercise reasonable care in carrying out a rescue.	8

B. COURTS ROUTINELY EVALUATE NEGLIGENCE "UNDER THE CIRCUMSTANCES" 9

C. THE COAST GUARD'S MISSION IS RESCUE, IT IS NOT A GOOD SAMARITAN 12

CONCLUSION 18

TABLE OF AUTHORITIES

Berg v. Chevron USA, Inc.,
59 F2d 1425, 1430 (9th Cir 1985) 4, 5, 9, 17

Bunting v. U.S., 884 F2d 1143, 1147 (9th Cir 1989) 8, 9

Chaffin v. U.S., 176 F3d 1208 (9th Cir 1999) 10

Coumou v. U.S., 107 F3d 290 (5th Cir 1997) 8

Eklof Marine Corp. v. United States,
762 F2d 200 (2nd Cir 1985) 11

Huber v. U.S., 838 F2d 398 (9th Cir 1988) 11

Metropolitan Stevedore Company v. Rambo,
515 US 291, 132 LEd 2d 226, 115 S Ct 2144 (1995) 13

Olympia Sauna Compania Naviera, SA v. U.S.,
670 F Supp 1498 (D. Or. 1987) 10

P. Doughtery Co. v. United States,
207 F2d 636, 634 (3rd Cir 1953) 14

Sutton v. Earles, 26 F3d 903 (9th Cir 1994) 10

United States v. DeVane,
306 F2d 182 (5th Cir 1962) 8

United States v. Gavagan,
280 F2d 319 (5th Cir 1960) 6

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

NO. _____

Christina Brewer, Personal Representative for the Estate of Richard Brewer, Petitioner

v.

United States of America, Respondent

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the Opinion of the Ninth Circuit Court of Appeals, issued in this case on December 30, 1999, affirming the district court dismissal of Petitioner's complaint.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California was filed June 25, 1998. The opinion of the Ninth Circuit Court of Appeals is unreported and is reproduced as Appendix A.

JURISDICTION

The Ninth Circuit opinion was filed December 30, 1999. This court has jurisdiction pursuant to 28 USC section 1254.

STATUTORY OR CONSITUTIONAL PROVISIONS INVOLVED

14 USCS § 88 (2000)

§ 88. Saving life and property

(a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

* * *

(b) (1) Subject to paragraph (2), the Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.

STATEMENT

This petition challenges the Ninth Circuit's rule applying a "Good Samaritan" rule of non-liability to the Coast Guard, even where the court assumed the Coast Guard to be negligent in carrying out an attempted rescue. This rule conflicts with the Fifth Circuit, which

would apply an ordinary negligence standard on these facts.

Petitioner's decedent, Richard Brewer, died on October 29, 1994, when the fishing boat he was using capsized in the surf in Monterey Bay, California and he was trapped underneath the boat which was wedged into the shore. Mr. Brewer was still alive when his boat reached the shore but he was trapped underneath the boat and bystanders on the beach, including an elderly couple, were unable to lift the boat off Mr. Brewer and he drowned.

For almost twenty-one minutes before his death, Mr. Brewer was in radio contact with the Monterey Bay Coast Guard station, which was located within ½ mile of where Mr. Brewer and his fishing companion were stranded without power and without an anchor. Appendix B is a visual re-creation of the time line showing where the Coast Guard vessel would have rescued Mr. Brewer had the vessel actually departed when Mr. Brewer was told it had, and where the Coast Guard would have intercepted Mr. Brewer's fishing boat if the Coast Guard had left at a reasonable time after first receiving the distress call, and at times when it recognized the extreme danger he was in.

Although the Coast Guard dispatcher recognized the "inherent danger of being at sea without power" and advised Mr. Brewer and his fishing companion to don their life jackets because the dispatcher believed someone was going to end up in the water, the Coast Guard: delayed rescuing Mr. Brewer for over 20 minutes until it was too late; mis-communicated the urgency of the rescue to the crew dispatched to rescue

Mr. Brewer; failed to call onshore 911 until **after** Mr. Brewer's boat capsized and became wedged into the shoreline; assured Mr. Brewer a vessel was "enroute" to rescue him even though it would not depart for another 5 minutes; and disregarded all of the risks (well-known to Coast Guard crewmembers) associated with being without power in Monterey Bay.

Mr. Brewer's widow sued in federal district court in Oregon. On defendant's motion, the case was transferred to California.

I. Trial Court Proceedings

Plaintiff filed her complaint in the federal district of Oregon on October 18, 1996. After transfer to the Northern District of California in March, 1997, the government moved for summary judgment, which was granted.

II. Trial Court Rulings

The trial court granted defendant's motion for summary judgment in a written opinion that applied existing Ninth Circuit law, Berg v. Chevron USA, Inc., 759 F2d 1425, 1430 (9th Cir 1985) and concluded, as a matter of law, that the Coast Guard did not negligently worsen the decedent's situation and that there was no evidence of recklessness. In evaluating the Coast Guard's conduct, the district court began with the time when it determined the Coast Guard "undertook the rescue of the Foxtrot." Opinion, p. 7.

III. The Ninth Circuit Opinion

In affirming the district court grant of summary judgment, the Ninth Circuit also applied Berg and, although it "assumed" the Coast Guard had been negligent after it undertook to rescue Mr. Brewer, the court declined to find liability based on its conclusion "there is nothing in the record to support a finding that the Coast Guard intentionally delayed the rescue or acted with a conscious disregard for the risks involved. The Coast Guard was responding to the risk, and its conduct was not reckless or wanton." (Opinion, pp. 2-3)

The Ninth Circuit also rejected plaintiff's contention that the Coast Guard worsened Mr. Brewer's situation by assuring him there was a "vessel enroute" when, in fact, no vessel had yet departed the dock and would not do so for more than 5 minutes. The Ninth Circuit considered the evidence regarding this issue and made its own determination that plaintiff's evidence and argument were insufficient.

Finally, the Ninth Circuit rejected plaintiff's invitation to "reexamine the scope of liability of the Coast Guard under established federal law", concluding that it was "bound by the existing law". (Opinion, p. 3; Appendix A, p. 3)

REASONS FOR GRANTING THE WRIT

A. THERE IS A CONFLICT IN THE CIRCUITS

1. The Fifth Circuit applies a negligence standard

Unlike the Ninth Circuit, the Fifth Circuit applies a negligence standard to actions taken by the Coast Guard, even when the actions occur in the midst of a rescue operation. United States v. Gavagan, 280 F2d 319 (5th Cir 1960). In Gavagan, the district court entered judgment against the government for the negligence of Coast Guard employees in their unsuccessful attempt to rescue the crew of a stranded vessel. Coast Guard employees, acting under their statutory duties pursuant to the National Search and Rescue Plan, undertook the unsuccessful rescue of a shrimp boat off the Florida coast, but during the rescue attempt, shore-based personnel mis-communicated information about the location of the shrimp boat to would-be Coast Guard rescuers. The Fifth Circuit affirmed the judgment against the government saying: "the critical mistakes were made, not by men taking great personal risk in heroic salvage service under trying conditions, but by those ashore in the failure to pass on and evaluate vital information." 280 F3d at 325, footnote omitted.

In this case, the Coast Guard dispatcher at Monterey Bay acknowledged he considered Mr. Brewer to be in moderate danger less than one minute into the radio transmission between Mr. Brewer and the Coast Guard station at Monterey Bay (1/2 mile away from where Mr. Brewer and his fishing companion were stranded without an anchor and with a malfunctioning engine).

Nonetheless, this information was not communicated to the crew who were eventually sent to rescue Mr. Brewer. Based on this lack of information, the crew moved slowly, without urgency when, had they understood the emergency, they could have rescued Mr. Brewer in 3 minutes or less, according to their testimony. Instead, Mr. Brewer died 20 minutes after he initially contacted the Coast Guard, trapped under his fishing boat on the shore of Monterey Bay with insufficient aid on the shore because 911 was not called by the Coast Guard in time to arrive there.

Had this action been filed in the Fifth Circuit, the Coast Guard's actions would have been evaluated (appropriately) under a simple negligence standard and there would have been liability to his widow and his infant son. Instead, because this case was decided under Ninth Circuit law, even though the court conceded the Coast Guard was negligent in undertaking the rescue and in the way it was implemented, there is no liability because the Ninth Circuit applies a higher standard, requiring recklessness or negligent worsening.[1]

---

[1] Plaintiff below, Petitioner here, believes the record demonstrates both recklessness by the Coast Guard and negligent worsening. The Coast Guard was reckless in disregarding what it knew about the urgency of Mr. Brewer's predicament (he was without anchor, without power, at sea – an "inherent danger", and he was drifting toward the surf in Monterey Bay, with the danger increasing every minute, and was likely to end up in the water) and also that they negligently worsened his condition by assuring him help was on the way (when it was not) and thus caused him to stay on the radio talking to the Coast Guard dispatcher when his boat capsized. His fishing companion, who was not on the radio, was tossed away from the boat and survived. Mr. Brewer was trapped in the cabin area where he had been receiving assurances of rescue from the Coast Guard.

A recent Fifth Circuit decision demonstrates this stark contradiction in the laws of the two circuits. In Coumou v. U.S., 107 F3d 290 (5th Cir 1997) a vessel captain brought a negligence action against the Coast Guard for its actions in turning the captain and his vessel over to Haitian authorities without telling the authorities the captain had been cooperating with the Coast Guard's seizure of his vessel for illegal drug cargo loaded by some of his crew members. In fact, the captain had radioed the Coast Guard crew asking them to board his vessel and search for the contraband. Because the Coast Guard neglected to convey this information to Haitian officials, the captain was imprisoned for six months in a Haitian jail and suffered serious physical and mental injuries. On an appeal by the government, the Fifth Circuit remanded for a determination of "whether the [Coast Guard's] failure to convey information to Haitian authorities constituted a breach of its duty of reasonable care." 107 F3d at 296. The Coast Guard's search and rescue operations should be evaluated in all circuits under this same negligence standard. This court should grant this Petition, reexamine the scope of Coast Guard liability, and resolve the conflict in the circuits.

2. Even the Ninth Circuit recognizes a duty to exercise reasonable care in carrying out a rescue.

The result in this case cannot be reconciled with the Ninth Circuit's recognition that "once the Coast Guard begins a rescue, it must use reasonable care in carrying it out." Bunting v. U.S., 884 F2d 1143, 1147 (9th Cir 1989) citing United States v. DeVane, 306 F2d 182 (5th Cir 1962). Here, there is no dispute the Coast Guard undertook to rescue Mr. Brewer. At 7 minutes, 40 seconds into the radio transmissions between Mr. Brewer

and the Coast Guard Monterey Station, Mr. Brewer is told: "we have a vessel enroute your position, over." (ER 43) Nonetheless, the vessel was not enroute, would not depart for another 5 minutes, headed in the wrong direction and thus would not arrive in time to save Mr. Brewer because the skipper of the Coast Guard vessel was not told of the urgency of Mr. Brewer's plight and therefore moved slowly, without urgency, arriving in time (17 minutes, 32 seconds elapsed time) to see Mr. Brewer's fishing boat crash into the shore line with Mr. Brewer wedged underneath. The skipper testified it would have taken him less than 3 minutes to reach Mr. Brewer's location had he moved with urgency.

Under Ninth Circuit law in Bunting and under Fifth Circuit law in Gavagon, the Coast Guard would have been liable to Mr. Brewer's widow and child for its negligence. Nonetheless, because the Ninth Circuit applied Berg's rule of non-liability, a rule justified by a desire to encourage voluntary rescue by "men of the sea", the complaint was dismissed. This was not a rescue attempt by men taking great personal risk in heroic salvage service under trying conditions. It was a failure by the Coast Guard to make what should have been a routine pickup in its own backyard. This court should clarify the applicable standard of care and create a clear, consistent guide for analyzing Coast Guard liability.

B. COURTS ROUTINELY EVALUATE NEGLIGENCE "UNDER THE CIRCUMSTANCES"

There exists a multitude of cases wherein government actors like the Coast Guard are held to a standard of

reasonable care. For example, in Sutton v. Earles, 26 F3d 903 (9th Cir 1994) the Ninth Circuit applied a negligence standard to government actors (the Navy and the Coast Guard) where it was alleged the failure to remove a submerged obstacle (a navy mooring buoy) in a [river or lake] may create liability because "injury is foreseeable" where the government knows pleasure boat traffic may use the channel and may collide with the buoy. The court defined the standard as follows: "A duty of care exists when injury is foreseeable." Id. at 912.

Under Ninth Circuit law, the government may be liable for failing to apply its "superior knowledge" of the propensities of polar bears to attack at a remote Air Force site in Alaska. Chaffin v. U.S., 176 F3d 1208 (9th Cir 1999). So too, the Coast Guard should be held accountable to use its "superior knowledge" of the risks of being at sea in deciding its culpability to stranded boaters who have been assured of rescue assistance.

Other examples include cases where the Coast Guard is held to a negligence standard for placing and maintaining marking buoys. Thus, if a buoy is negligently maintained, the Coast Guard may be liable if it fails to exercise reasonable care in implementing the buoy grid and fails to warn a mariner of the hazards. Olympia Sauna Compania Naviera, SA v. U.S., 670 F Supp 1498 (D. Or. 1987). Judge Leavy, then a district judge for the district of Oregon, now a Ninth Circuit judge, cited Indian Towing for the proposition that, where the government undertakes to warn the public of danger and thereby induces reliance, it must perform its task reasonably. 670 F Supp at 1504. The Second Circuit reached the same conclusion regarding buoy placement in Eklof Marine Corp. v. United States, 762 F2d 200 (2nd Cir 1985).

There, the Coast Guard was also held liable for its negligent placement of a buoy.

In this matter, the Coast Guard undertook to assure Mr. Brewer a vessel was enroute to rescue him. It was not, because of the Coast Guard's negligence in dispatching the vessel and in communicating between Coast Guard personnel. The Coast Guard vessel left at such a leisurely pace that it took more than 4 minutes to clear its own dock, once it finally got underway, at a time when the Coast Guard knew of the extreme danger. For this failure to act reasonably, the Coast Guard should be liable.

In Huber v. U.S., 838 F2d 398 (9th Cir 1988), the plaintiff recovered a settlement from the Coast Guard and the ship's owner for a failed rescue attempt. In a subsequent action for contribution between the Coast Guard and the ship's owner, the Ninth Circuit evaluated whether the Coast Guard's conduct in undertaking a rescue was shielded by discretionary immunity. The court concluded it was not, because: "This is not a case where the Coast Guard decided to conserve resources by not assisting vessels in certain situations. Instead, the Coast Guard decided to aid the [vessel], and then allegedly did so in a negligent manner." 838 F2d at 401. The court thus concluded the Coast Guard could be liable for its negligence in carrying out the rescue. Id.

The result in Huber cannot be reconciled with the result here where, even though the Ninth Circuit assumed negligence by the Coast Guard in carrying out the rescue of Mr. Brewer, it found no liability as a matter of law.

The negligence standard is appropriate and useful in these cases because it takes into consideration the actual circumstances existing in the situation. Thus, if this standard applied to the Coast Guard, the court or a jury can consider whether the Coast Guard rescuers are acting at great risk to themselves – such as a rescue at high sea, with adverse weather conditions and rapidly changing circumstances, or conversely, if, as occurred in this case, the Coast Guard dispatcher has readily available personnel and equipment, has an understanding of the risks faced by the stranded boater, has ample time to dispatch help to the boat which is only ½ mile away and nonetheless fails to successfully rescue the boater because, in part, the dispatcher does not disclose the urgency of the situation to the crew dispatched to rescue the boater. A trial judge then could decide whether the delay (over 15 minutes) to attempt the rescue, when crew members testified they could have been there in 3 minutes or less, is "reasonable under the circumstances" or whether the Coast Guard should be liable for its actions like any other actor under our rule of law.

C. THE COAST GUARD'S MISSION IS RESCUE, IT IS NOT A GOOD SAMARITAN

There is no plausible rationale for treating the Coast Guard like the untrained, ill-equipped volunteer who undertakes a rescue at great personal peril solely out of a concern for another human being. There simply is no comparison, for example, between the well-trained, highly equipped, experienced crew of the Monterey Bay Coast Guard station, self proclaimed experts at search and rescue, and any "Good Samaritan" such as the elderly couple on the beach who tried to lift the boat off Mr. Brewer and to save his life. To apply the same immunity

that might be enjoyed by the elderly couple to crew members from one division of our military forces whose mission is to "save lives" and whose motto is "always ready", is an unwarranted, ill-conceived policy.

The source of this old, but analytically weak and outdated rule of law is a 1951 decision of the district court in Massachusetts, Lacey v. U.S.. This court should reexamine and change the rule. As this court recognizes, repetition for 50 years of bad law does not make it good. Metropolitan Stevedore Company v. Rambo, 515 US 291, 132 LEd 2d 226, 115 S Ct 2144 (1995).

This rule of law should be changed because:

I. Its origin is suspect and is unsupportable in modern society; and

II. There is no valid policy rationale for Coast Guard immunity in rescue operations.

The history of the Good Samaritan immunity enjoyed by the Coast Guard is traced back to a 1951 decision of the district court in Massachusetts, Lacey v. United States. Lacey is factually distinguishable and its legal foundation is weak, at best. The district court was asked to resolve whether an aviation service whose plane had crashed could recover from the Coast Guard for its negligent failure to rescue the pilot and others who had been flying in the aviation service's plane. Thus, the case did not arise in facts that are typical in these cases, where a boater is stranded and calls the Coast Guard for assistance. Yet, for nearly 50 years the case has been

applied to the stranded boater cases and has served as a form of immunity for Coast Guard failure to rescue cases.

The rationale underlying the rule of non-liability from Lacey was later explained by the Third Circuit as the deleterious effect liability may have on military promotions and service records. P. Doughtery Co. v. United States, 207 F2d 636, 634 (3rd Cir 1953). The dissent in Doughtery urged that the Coast Guard be held accountable as any individual would for their own failure to exercise reasonable care:

"In other words, one who carelessly hurts the person or property of another is liable, whether he was rendering his service for pay or for nothing. With a statute making the United States, with specified exceptions, liable as any individual would be, the application of the general rule seems pretty clear in this case. And the United States need have no more fear of consequences than anyone else." 207 F3d at 651.

The only authority cited in Lacey for its rule of non-liability is a Harvard Law Review Article entitled, "Reliance on Gratuitous Promises or other Conduct", 64 Harvard Law Review 913-928 (1951). There is no analysis in Lacey to support its theory that the Coast Guard should be immune from liability or to explain how the Coast Guard is like a "Good Samaritan".

The better reasoned opinion is that of the Fifth Circuit in Gavagon where the court concluded there was no policy rationale for affording the Coast Guard immunity from liability for its negligence:

> "imposition of liability, i.e. a duty, will not deter performance of like search and rescue projects by the Government. The Government's vast machinery is put into operation, not out of any hope of reward, but out of a policy determination on the highest executive level that the resources of governmental agencies should be exploited effectively to save life and property." 280 F2d at 326 (footnote omitted)

There are few similarities between the Coast Guard and a Good Samaritan. Unlike a typical Good Samaritan, the Coast Guard has nearly a one-hundred year history of saving lives at sea. In 1915, Congress created the Coast Guard by merging two existing agencies, the Revenue-Cutter Service and the Life-Saving Service. Congress declared that "all duties now performed by the Revenue-Cutter Service and Life-Saving Service shall continue to be performed by the Coast Guard". Annual Report, 1915, p. 43, quoted in Robert Erwin Johnson, *Guardians of the Sea – History of the United States Coast Guard 1915 to the Present*, Naval Institute Press, Annapolis, Md (1987), p. 36. The Life-Saving Service evolved from private efforts in the late 1700's and early 1800's to establish lifeboat stations and line-throwing equipment at dangerous locations on the Massachusetts coast. By 1847, Congress responded to the growing number of shipwrecks off American shores by providing funding of $4,000 for equipping "lighthouses and other exposed places where vessels are liable to be driven on shore, with boats and other suitable means of equipment". Id., p. 4. "Thus began the movement that in due course would grow into the U.S. Life-Saving Service." p. 5. The Service experienced early success when, for example, in

1850, after the stranding of the British ship Ayshire, 201 persons out of 202 passengers were saved.

Also unlike the typical Good Samaritan, the Coast Guard continues to be funded, equipped, and its crew trained for its rescue mission. In keeping with its heritage, the 1998 Annual Report issued by the Coast Guard lists its motto at the end of each page - "America's Lifesaver and Guardian of the Sea." The Report touts the Coast Guard's expertise in rescue operations and lists as one of its accomplishments, response to 38,700 distress calls in 1998. As early as 1955, for example, a Coast Guard rescue necessitated by California floods involved Coast Guard units including "six aircraft, twenty-one cutters and boats and twenty-nine vehicles" belonging to the Coast Guard and with the assistance of twenty-one aircraft belonging to the other armed services. Any analysis of Coast Guard liability for failed rescue must take into consideration its expertise, training, equipment, resources and personnel. The actions of the Coast Guard should be evaluated like a person in "like circumstances", i.e. a highly trained, well-equipped, specialized division of the United States military.

In contrast to the citizen who chooses to act as a Good Samaritan and who should enjoy limited immunity for the choice to put their lives at risk to save another, the Coast Guard has as its statutory mission to "perform any and all acts necessary to rescue and aid persons and protect and save property". 14 USC section 88. Thus, the traditional rationale of providing immunity in order to encourage private citizens to risk their lives to save others at sea, is unnecessary, even absurd, as applied to the Coast Guard.

In Berg v. Chevron USA, Inc., 759 F2d at 1429, the Ninth Circuit restated its rule that "a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue." In Berg, the alleged wrongful conduct was that of Chevron, not the Coast Guard. The proferred rationale in Berg for applying a standard of care higher than an ordinary negligence standard is the admiralty law's desire to "encourage and induce men of the sea to go to the aid of life and property in distress." 759 F2d at 1429, citing 3A M. Norris, *Benedict on Admiralty* section 234 (7th ed. 1980)

Nowhere does the Ninth Circuit explain why the Coast Guard needs encouragement to go to the aid of life and property in distress, when to do so is its stated mission and it is authorized by statute to perform that mission. In contrast to the passerby, the Coast Guard undertakes rescues because it exists, in part, for that purpose. There is no need of any incentive or special treatment. The rationale supporting a Good Samaritan rule of non-liability for negligence is unavailing in analyzing the Coast Guard's conduct and should not be applied. There is no statute modifying the abrogation of Sovereign Immunity to protect the Coast Guard in this way.

The government is held liable for its negligence in many other arenas. There is no policy or other basis for treating the Coast Guard differently.

CONCLUSION

This court should grant the Petition and review and change the law granting Good Samaritan immunity to the Coast Guard.

DATED: March 20, 2000

Respectfully submitted,

HELEN T. DZIUBA,
ATTORNEY AT LAW

By: Helen T. Dziuba
Helen T. Dziuba
Counsel of Record for
Petitioner Christina Brewer,
Personal Representative for
the Estate of Richard Brewer

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16345
D.C. No. CV-97-00902-MJJ

Christina Brewer, Personal Representative
for the Estate of Richard Brewer,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Argued and Submitted November 5, 1999
San Francisco, California

Before: GOODWIN, SCHROEDER,
ALARCÓN, Circuit Judges.

Christina Brewer, as personal representative of the Estate of Richard Brewer, her late husband, appeals the district court's summary judgment dismissal of her action against the United States under the Public Vessels Act, 46 U.S.C. § 781. Richard Brewer drowned when his small

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

boat capsized in the surf of Monterey Bay before the Coast Guard rescue ship reached him.

Our law is well settled that a rescuer is liable only for reckless and wanton conduct in performing the rescue, or for negligent conduct that worsens the position of the victim. See Berg v. Chevron USA, Inc., 759 F.2d 1425, 1430 (9th Cir. 1985). The United States is liable only to the extent that a private person would be liable under the same circumstances. See Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 228 (1945); Dearborn v. Mar Ship Operations, Inc., 113 F.3d 995, 996 (9th Cir. 1997).

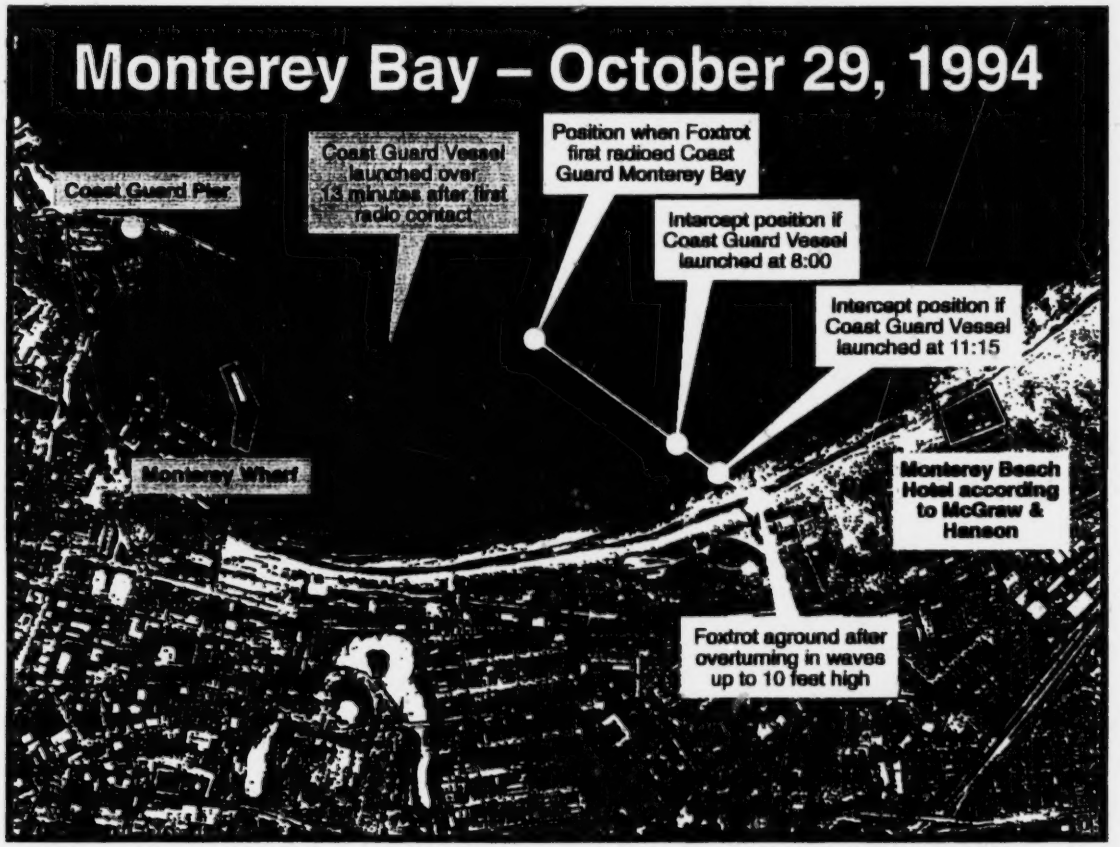
The Coast Guard reached the capsized Brewer boat approximately thirteen minutes after it undertook the rescue mission. We assume that some of the delay in reaching the boat and summoning ground emergency services is attributable to negligence, but there is nothing in the record to support a finding that the Coast Guard intentionally delayed the rescue or acted with a conscious disregard for the risks involved. The Coast Guard was responding to the risk, and its conduct was not reckless or wanton.

Plaintiff also contends that the record supports an inference that the Coast Guard worsened the decedent's position by continuing to talk to him on a radio located inside the cabin of the boat, causing him to be in a vulnerable position when the boat capsized. The record establishes, however, that Brewer was at the helm of the boat when it capsized and that the helm was on the deck

of the boat rather than inside the cabin. Hoover stated in his deposition that the last time he saw Brewer, he was standing at the helm with the radio handset in his hand. Hoover's deposition also states that the helm was in the cockpit area of the boat not in the tiny cabin in which a person could not stand upright.

Plaintiff asks us to reexamine the scope of liability of the Coast Guard under established federal law, but this court is bound by the existing law.

The judgment of the district court in favor of the defendant AFFIRMED.


Monterey Bay – October 29, 1994
Coast Guard Pier
Coast Guard Vessel launched over 15 minutes after first radio contact
Position when Foxtrot first radioed Coast Guard Monterey Bay
Intercept position if Coast Guard Vessel launched at 8:00
Intercept position if Coast Guard Vessel launched at 11:15
Monterey Wharf
Monterey Beach Hotel according to McGraw & Hanson
Foxtrot aground after overturning in waves up to 10 feet high

Supreme Court, U.S.
(2) FILED
091671 MAR 2 4 2010
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTINA BREWER, Personal Representative for the Estate of Richard Brewer,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

SUPPLEMENTAL APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

Helen T. Dziuba
1250 Standard Plaza
1100 SW Sixth Avenue
Portland, Oregon 97204
(503) 224-3333
Counsel of Record

16pp

FILED JUN 25 1998
US District Court for the
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 97-00902 MJJ

CHRISTINA BREWER, Personal Representative for the Estate of Richard Brewer,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

---

1. INTRODUCTION

This is a wrongful death action brought under federal admiralty jurisdiction pursuant to the Public Vessels Act, 46 U.S.C. §§ 781-790, and the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, against the United States of America. Plaintiff Christina Brewer alleges that Coast Guard is responsible for the death of her husband, Richard Brewer. Having considered the parties' briefs, exhibits, declarations, and arguments of counsel, the Court hereby **GRANTS** defendant's motion for summary judgment.

II. BACKGROUND

On October 29, 1994, Richard Brewer ("Brewer") and David Hoover ("Hoover"), students studying Russian at the Defense Language Institute in Monterey, California, went fishing on Monterey Bay in Brewer's fishing boat called the Foxtrot. The Foxtrot was a 19-foot long boat, equipped with an outboard motor and a radio located in its small cabin. The boat was equipped with safety gear, including an air horn and life jackets, but did not have an anchor.

Brewer and Hoover launched from the Coast Guard pier sometime between 11:30 and 11:45 a.m. Following a short stop about a half a mile from shore, they began to head further out. Noticing that Foxtrot was moving unusually slow, they shut off the engine to examine the problem. After removing some kelp from the motor blade, they attempted to restart the engine. The engine would not restart. They tried a few remedial measures, which were unsuccessful.[1]

Hoover got on the radio, and broadcasted the message, "Is anyone out there?", over emergency channel 16 on the radio. Brandon Hansen ("Hansen"),[2] a telecommunications

---

[1] According to Hoover's deposition, Brewer immediately became scared, because Brewer got seasick. He also feared that they would be unable to get a tow, that they would drift into the beach and that they would get swamped in the breakers. They tried to get help from other boats in the area, including the Fish and Game Wardens, by waving their arms and blasting the air horn, but no one responded.

[2] Hansen was under the supervision of Gary Walker ("Walker"), the officer of the Day ("OOD") and the Search and Rescue (SAR) controller at Monterey on October 29, 1994.

specialist with the Coast Guard Monterey unit, responded. At this point, Brewer took over the radio transmission on the Foxtrot.

Brewer first told the Coast Guard that their motor had gone out, and they required assistance. Pursuant to National Coast Guard procedures, Hansen asked for the location of the boat and the number of persons in the boat. He told Hansen that they were halfway between the Monterey Hotel and the Wharf, that they were in a 19-foot red and white marlin and that there were two people in the boat.

Hansen then asked Brewer if he was in any immediate danger. Brewer said he was not.[3] Hansen also asked them to don their life jackets and to anchor the vessel. Brewer responded that he could not do this because the anchor was gone, but that they had donned their life jackets. At this point, approximately three and a half minutes had elapsed since radio contact was established.

During the initial conversation between Hansen and Brewer, Walker instructed Dennis McGraw ("McGraw"), the coxswain of Coast Guard Vessel 367, to conduct a routine law enforcement patrol of the bay. Walker also informed McGraw that the Foxtrot was disabled and might need some assistance. More specifically, Walker informed McGraw that the Foxtrot was drifting toward shore as it did not have an anchor, that the wind and seas were calm, and that the Foxtrot did not appear to be in any immediate distress.

---

[3] This was his first response, but Hansen did not hear him. When Hansen repeated the question of whether he was in any immediate danger, he responded, "[n]ot right at the minute."

Therefore, McGraw was not given specific instructions to assist the Foxtrot because at this point, the situation was not considered to be an emergency.

After Brewer told Hansen that the anchor was gone and they had donned their life jackets, Hansen asked him to switch radio channels. Once communication was reestablished on a different channel, Hansen confirmed with Brewer that he was having engine problems. Hansen then asked him about the on-scene weather, visibility, wind direction and seas direction.[4] Brewer responded that the wind was blowing the Foxtrot towards the seashore. Hansen then asked how far the Foxtrot was from shore. At this point, communications were blocked off several times because of another boat's audio transmission.

Knowing now that the Foxtrot was headed toward shore, Walker, about six minutes and forty seconds into the transmission ("minute 6:40"), upgraded the Foxtrot's situation from an MARB to a distress case requiring an Urgent Marine Information Broadcast ("UMIB"), an emergency message to all boaters in the area. He contacted McGraw again, and instructed him to go pick up Brewer and Hoover. Consequently, McGraw started preparing Coast Guard Vessel 367 for departure at minute 6:40.

---

[4] Hansen treated this situation as a non-distress case, and thus, prepared a Marine Assistant Request Broadcast ("MARB"). A MARB is a communication to boaters in the area requesting voluntary assistance to aid a boat in non-distress situations. It is used to invite persons, such as commercial providers or Good Samaritans, interested in responding if they so desire.

Approximately seven minutes and forty seconds into the transmission ("minute 7:40"), Hansen informed Brewer that the Coast Guard had a vessel on route to his position. He then asked Brewer if anyone had any medical problems. Brewer said no, but within a few minutes, indicated that the waves were breaking right in front of the boat. Hansen then asked more questions about the exact location of the boat, and requested descriptions of those people on board.

After he got their descriptions, Hansen broadcasted a UMIB about twelve minutes and four seconds into the transmission ("minute 12:04"). He described the Foxtrot and its general location and indicated that the Foxtrot was disabled and drifting toward shore in the Del Monte Beach area. He also asked all vessels to maintain a sharp lookout for the Foxtrot, to report all sightings of the boat, and to assist if possible.

About thirteen minutes and ten seconds into the transmission, McGraw's vessel left the Coast Guard dock. After a few minutes of communication with other Coast Guard vessels about the Foxtrot, Hansen attempted to resume communications with Brewer, but was unable to reestablish contact. About seventeen minutes and thirty-two seconds into the transmission, McGraw contacted Hansen, telling him that the Foxtrot had capsized on the beach.

When the boat capsized, Hoover was thrown off the boat, but Brewer was trapped underneath in the small cabin. Hoover and a group of people were unable to turn the boat over. Before Hoover was able to pull him out of the cabin, Brewer drowned.

Meanwhile, Coast Guard Mobile 2 asked Hansen whether it should respond. Hansen advised them that Monterey Fire Department was already headed to the scene. Shortly thereafter, a Junior Officer of the Day ("JOOD") from the Coast Guard arrived on the scene to assist. The JOOD informed Hansen that Coast Guard Mobile 2 arrived on the scene and that the ambulance had pulled up to administer medical treatment.

III. LEGAL STANDARD

To withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. See Fed. R. Civ. P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, "the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In opposing summary judgment, plaintiff is not entitled to rely on the allegations of his complaint. She "must produce at least some 'significant probative evidence tending to support the complaint.'" T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 626, 630 (9th Cir. 1987)(quoting First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968)).

The Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in the light most favorable to the non-moving party. See T.W. Elec. Serv., Inc., 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts . . ." Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 (9th Cir. 1980).

IV. DISCUSSION

A. Applicable Law

Admiralty law, and the law of rescue attempts in particular, has a number of unique legal standards which apply in any analysis. Under the Public Vessels Act, a party has no greater right against the United States than she would have against a private person under similar circumstances. Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 228 (1945). A private party has no affirmative duty to rescue a vessel or person in distress. Lacey v. United States, 98 F. Supp. 219, 229 (D. Mass. 1951). Likewise, the Coast Guard has no affirmative duty to render aid to a vessel or person in distress. Frank v. United States, 250 F.2d 178, 180 (3rd Cir. 1957), cert. denied, 356 U.S. 962 (1958); Wright v. United States, 700 F. Supp. 490, 494 (N.D. Cal. 1988); Daley v. United States, 499 F. Supp. 1005, 1009 (D. Mass. 1980).

If the Coast Guard responds to a call for assistance, it is not required to provide any particular kind of vessel, or equip its boats in any particular way. Frank, 250 F.2d at 180;

United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189, 197 (1st Cir. 1967), cert denied, 389 U.S. 836 (1967). The Coast Guard is not held to any higher standard of care in its rescue operations than a private person Private Boats v. United States, 352 F. Supp. 44, 48 (E.D. Va. 1972).

In considering plaintiff's arguments, the Court may not second-guess the decisions made by rescue personnel in the midst of the rescue attempt, Wright, 700 F. Supp. at 495; Page v. United States, 105 F. Supp. 99, 102 (E.D. La. 1952), or the decisions of rescue personnel concerning the proper time to begin rescue attempt. McLaughlin v. United States, 671 F. Supp. 72, 75 (D. Me. 1987) (failure of Coast Guard to initiate search and rescue activity not subject to evaluation of a court for reasonableness); Daley, 499 F. Supp. at 1009 (Coast Guard's decision to delay commencement of search not actionable).

A rescue attempt must be considered in the light of the circumstances that faced the rescuers when they acted and not with the wisdom of an "armchair admiral" after the fact. Afran Transport Co. v. S/S Transcolorado, 458 F.2d 164 (5th Cir. 1972); Johnson v. United States, 378 F.2d 732 (9th Cir. 1967). Indeed, "of all the branches of jurisprudence, the admiralty must be the most hospitable to the impulses of man and law to save life and limb and property." Grigsby v. Coastal Marine Service of Texas, Inc., 412 F.2d 1011, 1021 (5th Cir. 1969), cert. denied, 396 U.S. 1033 (1970).

With these unique admiralty rules in mind, a rescuer will be held liable only if: (1) the rescuer's conduct was negligent and that conduct worsened the position of the victim; or (2)

the rescuer's actions, in performing the rescue, constituted reckless and wanton conduct. Berg v. Chevron, 759 F.2d 1425, 1430 (9th Cir. 1985).

B. The First Prong of the Berg Standard

The Court finds that plaintiff fails to meet the first prong of the Berg test. Here, even assuming arguendo that the Coast Guard was negligent in failing to respond more quickly, there is absolutely no evidence that the Coast Guard's conduct worsened the condition of the victim. The Foxtrot would have been swept ashore in any event as a result of the wind and surf conditions and, as importantly, because it did not have an anchor. As such, there is no substantial probative evidence to support any finding that the Coast Guard worsened the victim's situation. Moreover, Plaintiff provided no argument on this issue in her opposition papers and indeed conceded at oral argument that her principle contention is that there is evidence of reckless and wanton conduct. (See Transcript of Hearing, February 24, 1998, p. 7). Therefore, the Court finds that Plaintiff has failed to raise a genuine issue of material fact with respect to the first prong of the Berg test.

C. The Second Prong of the Berg Standard

Defendant also may be held liable if the Coast Guard acted recklessly and wantonly in performing the rescue. Berg, 759 F.2d at 1430. Plaintiff argues that a reasonable trier of fact could find that Defendants alleged slow response after it undertook the rescue amounted to reckless and wanton conduct.

In analyzing this issue, the Court must first determine when the Coast Guard undertook the rescue of the Foxtrot. The question of when a rescue attempt begins is fundamentally a question for the jury, Furka v. Great Lakes Dredge and Dock Co., 755 F.2d 1085, 1088, ("Furka I")(4th Cir.1985). However, it is clear from the record herein that the earliest time the Coast Guard's rescue attempt could have begun is when the Coast Guard decided to send its own resources to rescue Brewer. Based on the record, this occurred at minute 6:40. At this juncture, Walker upgraded the status of the Foxtrot from a regular tow situation to an emergency situation and directed McGraw to go and pick up Brewer and Hoover. McGraw did not leave the dock until about thirteen minutes and ten seconds into the transmission. The question on this motion, then, is whether a reasonable trier of fact could find that the six and one half minutes it took for McGraw to leave the dock constituted reckless and wanton conduct.

The wanton and reckless standard arose at common law in recognition of the fact that one may be driven to acts during a rescue that would not befit a reasonable prudent person. Furka v. Great Lakes Dredge and Dock Company, 824 F.2d 330, 331 (4th Cir. 1987)("Furka II"). Under common law, "reckless and wanton conduct" is often defined as where "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences." W. Page Keeton et al., Prosser & Keeton on the Law of Torts, § 34, at 213 (5th ed. 1984); see, e.g., In Re Exxon Valdez, 1995 WL 527989*1, *10 (D. Alaska 1995)(court instructed jury that

negligence is the failure to use reasonable care, whereas reckless conduct "requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person"); Protectus Alpha Nav. v. N. Pacific Grain Growers, 767 F.2d 1379, 1385 (9th Cir. 1985)(defendant dock owner's conduct of casting away burning vessel in blatant disregard of the safety of the firefighters on scene was reckless). Despite these alternative standards, the essential outlines of reckless and wanton conduct are clear: defendants must have acted intentionally or with conscious disregard for a known or obvious risk of danger.

Here, once Hansen and Walker determined that Brewer was in immediate danger, they initiated a rescue attempt. Walker then ordered McGraw to rescue Brewer and Hoover. According to Walker, he told McGraw that it was an emergency situation and that the Foxtrot was drifting toward shore. However, he also told him that the wind and surf were calm, and did not tell McGraw how far the Foxtrot was from shore. In contrast, McGraw testified that he was never told that Brewer's situation was a distress call. He also testified that he would have responded sooner, had he known that it was an emergency situation. Nevertheless, more that six minutes elapsed between the time McGraw was directed to rescue Brewer and Hoover and when the Coast Guard vessel left the dock.

Defendant, however, has offered essentially uncontradicted evidence that this delay of more than six minutes did not represent any uncommon or unusual amount of time in launching the rescue vessel and certainly did not

represent reckless and wanton conduct. Specifically, the deposition testimony of Walker and McGraw demonstrate that the Coast Guard did not take any action or fail to take any action of an intentional nature or reflective of a conscious disregard of a known or obvious risk.

McGraw testified as follows:

> Q: Okay. Now the note on here, as it says "1214" or "215 UW." UW, what does that mean?
> A: Underway.
>
> Q: Okay. What was going on in that 8 minutes between 1207 and 1215?
> A: Getting the crew assembled, lighting off the boat, briefing the crew.
>
> Q: Okay. Well, you know, how – if you have to get out – if you got an emergency where you got to go someplace in a big hurry, how long can you get underway from the moment somebody says go?
> A: It depends on where the boat crew is. It's a pretty big group, the – the building structure.
>
> Q: Okay. How many people were aboard the vessel with you?
> A: Three

Q: Three. Who are the other three people – who are the other two people?
A: Seaman Martinez

Q: Okay.
A: And Fireman Fisher.

McGraw Depo, 42:3-23

Walker testified as follows:

Q: How long would you expect it to take before the Coast Guard Vessel is underway.
A: Be more specific

Q: Sure. You have got a boat that has got to go pick this man up. How long would you expect from 12--- from the time when you talked to Mr. McGraw, about 12:07, that it would be before Mr. McGraw would be on the water moving toward the Foxtrot?
A: Roughly 5 minutes.

Q: Okay. And what would take 5 minutes?
A: The crew had to be equipped with their weapons. No Coast Guard crew can get underway without their weapons. The crew also has to take time to start up the boat, get the engines going and do their preliminary checks. It does no good if the boat gets out there and breaks down.

Walker Depo, 63:5-22

The above-referenced deposition excerpts provide crucial and essentially unrebutted testimony as to what the Coast Guard did after the call was upgraded to emergency status. McGraw's testimony, while somewhat sparse, reflects that the Coast Guard was attempting to effect a rescue during the crucial 6-8 minute time frame (briefing the crew, lighting the boat, etc.) and is corroborated by Walker's opinion testimony that it would take about 5 minutes for McGraw to get underway after he informed McGraw of the emergency. This crucial evidence, read especially in light of admiralty rules which preclude second-guessing rescue operations and encourages rescuers to undertake rescues, precludes any reasonable inference of reckless or wanton conduct arising from a failure to respond more quickly. Quite simply, there is no evidence that the Coast Guard acted intentionally or with conscious disregard for a known or obvious risk of danger.

The testimony of McGraw and Walker is essentially unrebutted notwithstanding the expert testimony adduced by plaintiff that the Coast Guard should have undertaken rescue measures sooner. Under the relevant case law, the Coast Guard has no duty to effect rescue until it undertakes to do so. On these facts, their duty arose at or about the 6:40 mark. The task on this motion is to assess the Coast Guard's conduct under the Berg standard from this juncture forward.

Since the record evidences that the Coast Guard was undertaking reasonable rescue efforts during the time period after the call was upgraded to emergency status, Plaintiff's argument that defendant did nothing during this crucial time period is severely undermined. While the testimony of McGraw and Walker do not account for the entire 6-8 minutes it took to get underway after the call was upgraded

to emergency status, it takes the defendant's conduct out of the realm of reckless or wanton misconduct. Therefore, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Dated: June 25, 1998.

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN
CLERK

(3)

No. 99-1671

In the Supreme Court of the United States

CHRISTINA BREWER, PERSONAL REPRESENTATIVE FOR THE ESTATE OF RICHARD BREWER, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

ROBERT S. GREENSPAN
JOHN P. SCHNITKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The government's liability for maritime torts under the Suits in Admiralty Act (SIAA), 46 U.S.C. 741 *et seq.*, is the same as that "obtaining in like cases between private parties." 46 U.S.C. 743. Suits for maritime torts under the Public Vessels Act (PVA), 46 U.S.C. 781 *et seq.*, "shall be subject to and proceed in accordance with" the requirements of the SIAA, to the extent the SIAA is not inconsistent with the PVA. 46 U.S.C. 782. The question presented is:

Whether, for purposes of suit under the SIAA and PVA, the conduct of the Coast Guard in attempting to rescue a stranded vessel is subject to the "Good Samaritan" standard applicable to private parties or to a different standard.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Arizona Maintenance Co. v. *United States*, 864 F.2d 1497 (9th Cir. 1989)	10
Berg v. *Chevron USA, Inc.*, 759 F.2d 1425 (9th Cir. 1985)	4, 6
Bunting v. *United States*, 884 F.2d 1143 (9th Cir. 1989)	8, 9
Canadian Transp. Co. v. *United States*, 663 F.2d 1081 (D.C. Cir. 1980)	11
Cassens v. *St. Luis River Cruise Lines*, 44 F.3d 508 (7th Cir. 1995)	11
Chaffin v. *United States*, 176 F.3d 1208 (9th Cir. 1999)	9
Coumou v. *United States*, 107 F.3d 290, amended, 114 F.3d 64 (5th Cir. 1997)	8
Eklof Marine Corp. v. *United States*, 762 F.2d 200 (2d Cir. 1985)	9
Furka v. *Great Lakes Dredge & Dock Co.*, 755 F.2d 1085 (4th Cir. 1985)	6
Gercey v. *United States*, 540 F.2d 536 (1st Cir. 1076), cert. denied, 430 U.S. 954 (1977)	11
Good v. *Ohio Edison Co.*, 149 F.3d 413 (6th Cir. 1998)	10
Huber v. *United States*, 838 F.2d 398 (9th Cir. 1988)	9
Joint E. & S. Dists. Asbestos Litig., In re, 891 F.2d 31 (2d Cir. 1989)	11

Cases—Continued:	Page
Miller v. *United States*, 725 F.2d 1311 (11th Cir. 1984)	7
Olympia Sauna Compania Naviera, S.A. v. *United States*, 670 F. Supp. 1498 (D. Or. 1987)	9
Sea-Land Serv., Inc. v. *United States*, 919 F.2d 888 (3d Cir. 1990)	11
Sutton v. *Earles*, 26 F.3d 903 (9th Cir. 1994)	9
United States v. *Gavagan*, 280 F.2d 319 (5th Cir. 1960)	7, 8
United States v. *Lawter*, 219 F.2d 559 (5th Cir. 1955)	8
United States v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976)	7
Wisniewski v. *United States*, 353 U.S. 901 (1957)	10
Statutes:	
Death on the High Seas Act, 46 U.S.C. 761 *et seq.*	7
Federal Tort Claims Act:	
28 U.S.C. 1346(b)(1) (1994 & Supp. IV 1998)	7
28 U.S.C. 2674 *et seq.*	7
28 U.S.C. 2680(d)	7
Public Vessels Act, 46 U.S.C. 781 *et seq.*	3-4
46 U.S.C. 781	4, 6
46 U.S.C. 782	4, 6, 7
Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*	3
46 U.S.C. 742 (1994 & Supp. III 1997)	3, 6
46 U.S.C. 743	4, 7
14 U.S.C. 88(a)	10
14 U.S.C. 88(a)(1)	10

In the Supreme Court of the United States

No. 99-1671

CHRISTINA BREWER, PERSONAL REPRESENTATIVE FOR THE ESTATE OF RICHARD BREWER, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 210 F.3d 381 (Table). The opinion of the district court (Pet. App. 1c-15c) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1999. The petition for a writ of certiorari was filed on March 24, 2000. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Christina Brewer claims that the United States Coast Guard is responsible for the death of her husband, Richard Brewer (Brewer), in a boating accident in Monterey Bay, California. On October 29, 1994, Brewer and David Hoover went fishing in Monterey Bay on Brewer's boat, the *Foxtrot*. About a half-mile from shore, the *Foxtrot* experienced engine difficulties and Brewer and Hoover were unable to get it restarted. Pet. App. 2c. Brewer established radio contact with Brandon Hansen, the Coast Guard operator on duty, and told him that they required assistance because the *Foxtrot*'s motor had gone out. Hansen, under the supervision of Gary Walker (the Coast Guard Officer of the Day and the Search and Rescue controller for Monterey Bay), requested the *Foxtrot*'s position and asked whether they were in immediate danger. *Id.* at 2c-3c. Brewer advised Hansen of the *Foxtrot*'s position and stated that they were not in immediate danger. Hansen asked them to anchor the *Foxtrot* and don life jackets. At the same time, Walker informed Dennis McGraw, coxswain of Coast Guard Vessel 367, that the *Foxtrot* was disabled, and directed him to conduct a routine patrol of the Bay. *Id.* at 3c.

Brewer advised Hansen that he and Hoover had donned life jackets but that the *Foxtrot* was without anchor. After a further discussion about conditions near the *Foxtrot* (interrupted several times because of another boat's transmissions), Hansen learned that the *Foxtrot* was drifting toward shore. Based on that information, Walker upgraded the *Foxtrot*'s status to a distress case and instructed McGraw to go pick up Brewer and Hoover. McGraw started preparing Vessel

367 for departure six minutes and 40 seconds after Brewer and Hansen first made radio contact. Pet. App. 4c.

One minute later, Hansen informed Brewer that a Coast Guard vessel was on its way to his position. Hansen requested further information from Brewer about the *Foxtrot*'s location and about any medical problems that he or Hoover was experiencing. Brewer advised Hansen that they had no medical problems but that the waves were breaking right in front of the *Foxtrot*. At that point, 12 minutes and four seconds after first making radio contact with Brewer, Hansen issued an emergency message to all boaters. In that message, Hansen described the *Foxtrot*'s location, indicated it was disabled and drifting toward shore, and asked all vessels to assist if possible. After a few minutes communicating with other Coast Guard vessels about the *Foxtrot*, Hansen attempted to reestablish contact with Brewer but was unable to do so. Pet. App. 5c.

McGraw's vessel left the Coast Guard dock 13 minutes and ten seconds after radio contact was first made. About 17 minutes and 32 seconds after first contact, McGraw radioed to Hansen that the *Foxtrot* had capsized on Del Monte beach. Hoover was thrown clear of the boat when it capsized, but Brewer was trapped underneath and drowned. Pet. App. 5c.

2. Petitioner filed the instant suit against the Coast Guard under the Suits in Admiralty Act (SIAA), 46 U.S.C. 741 *et seq.*,[1] and the Public Vessels Act (PVA),

---

[1] 46 U.S.C. 742 (1994 & Supp. III 1997) permits "appropriate nonjury proceeding[s] in personam * * * against the United States," in cases where, "if a private person or property were involved, a proceeding in admiralty could be maintained." Under

46 U.S.C. 781 *et seq.*,[2] alleging that the Coast Guard negligently failed to timely rescue Brewer. The district court granted summary judgment for the government. Pet. App. 1c-15c. Observing that the SIAA and PVA grant petitioner "no greater rights against the United States than she would have against a private person under similar circumstances," *id.* at 7c, the district court analyzed whether the Coast Guard's conduct fell below the standard for Good Samaritan rescuers established in *Berg* v. *Chevron USA, Inc.*, 759 F.2d 1425 (9th Cir. 1985).

Under *Berg*, a Good Samaritan may be held liable only if: (1) the rescuer's conduct was negligent and that conduct worsened the position of the victim; or (2) the rescuer engaged in reckless and wanton conduct while performing the rescue. 759 F.2d at 1430. On the first *Berg* prong, the district court found no evidence that the Coast Guard's conduct worsened Brewer's condition and noted that petitioner presented no argument on that point. Pet. App. 9c. On the second *Berg* prong, the court observed that a finding of reckless and wanton conduct requires a showing that the Coast Guard acted "intentionally or with conscious disregard for a known or obvious risk of danger." *Id.* at 11c. The court found no evidence that the Coast Guard acted in that manner in this case. Acknowledging that "more

---

46 U.S.C. 743, the government's liability for maritime torts under the SIAA is the same as that "obtaining in like cases between private parties."

[2] 46 U.S.C. 781 permits suits "in admiralty * * * against the United States * * * for damages caused by a public vessel of the United States." Under 46 U.S.C. 782, suits brought pursuant to the PVA "shall be subject to and proceed in accordance with the provisions" of the SIAA, to the extent the SIAA is not inconsistent with the PVA.

tha[n] six minutes elapsed between the time McGraw was directed to rescue Brewer and Hoover and when the Coast Guard vessel left the dock," the court also noted the presence in the record of "essentially uncontradicted evidence that this delay of more than six minutes did not represent any uncommon or unusual amount of time in launching the rescue vessel." *Ibid.* In light of that uncontroverted evidence, the court held that such an interval "certainly did not represent reckless and wanton conduct," *id.* at 11c-12c, and granted the government's motion for summary judgment. *Id.* at 15c.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-3a. Applying *Berg*, the court held that the Coast Guard's conduct was neither reckless nor wanton and did not worsen Brewer's position. *Id.* at 2a-3a. While the court was willing to "assume that some of the delay in reaching the [*Foxtrot*] and summoning ground emergency services is attributable to negligence," it found "nothing in the record to support a finding that the Coast Guard intentionally delayed the rescue or acted with a conscious disregard for the risks involved." *Id.* at 2a. The court also declined to "reexamine the scope of liability of the Coast Guard under established federal law." *Id.* at 3a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Under the SIAA, the United States waives its sovereign immunity and subjects itself to suit for the actions of its employees only in circumstances where a private party would be subject to maritime tort liability

for the same conduct. See 46 U.S.C. 742 (1994 & Supp. III 1997) (permitting "any appropriate nonjury proceeding in personam" in cases where "if a private person or property were involved, a proceeding in admiralty could be maintained."). The PVA, in turn, permits suits "in admiralty * * * against the United States * * * for damages caused by a public vessel of the United States," 46 U.S.C. 781, and provides that such suits "shall be subject to and proceed in accordance with the provisions" of the SIAA to the extent the SIAA is not inconsistent with the PVA. 46 U.S.C. 782. Accordingly, the SIAA and PVA together authorize suit against the United States only for conduct during a maritime rescue that would yield tort liability if undertaken by a private party.

As petitioner concedes (Pet. 12-17), a private party undertaking a maritime rescue is subject to the Good Samaritan standard. See *Berg*, 759 F.2d at 1429-1430; *Furka* v. *Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1088 (4th Cir. 1985). Under that standard, "a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue." *Berg*, 759 F.2d at 1430. Recognizing that the SIAA and PVA subject the United States to the same standard of care to which private parties are subject in like circumstances, the district court properly applied the Good Samaritan standard to the Coast Guard's actions in this case and concluded that there was no record evidence to support a finding of liability. See Pet. App. 8c-15c.

Petitioner insists (Pet. 12-17) that the Good Samaritan standard should apply only to private parties and not to the Coast Guard. Congress, however, has specified that the government's liability under the SIAA and

PVA shall be the same as that "obtaining in like cases between private parties." 46 U.S.C. 743; see 46 U.S.C. 782 (PVA suits "shall be subject to and proceed in accordance with" the requirements of the SIAA). Having acknowledged (Pet. 12-17) that the Good Samaritan standard applies to private parties undertaking maritime rescues, petitioner offers no reading of the controlling statutes that would permit holding the Coast Guard to a different standard.

2. Contrary to petitioner's assertions (Pet. 6-8), the court of appeals' unpublished opinion in this case does not conflict with the Fifth Circuit's decision in *United States* v. *Gavagan*, 280 F.2d 319 (1960). In *Gavagan*, the Fifth Circuit held the Coast Guard liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1) (1994 & Supp. IV 1998), 28 U.S.C. 2674 *et seq.*, and the Death on the High Seas Act, 46 U.S.C. 761 *et seq.*, for the loss of a shrimp boat and its crew in a storm. Strictly speaking, therefore, *Gavagan* involved statutory provisions not at issue in this case. Not until 1960, after the events at issue in *Gavagan*, did Congress make the SIAA the sole remedy against the United States for maritime torts, and provide that such suits could no longer be brought under the FTCA. See 28 U.S.C. 2680(d); *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 172-177 & n.14 (1976); *Miller* v. *United States*, 725 F.2d 1311, 1314 (11th Cir. 1984) (discussing the amendment's impact on *Gavagan*'s exercise of FTCA jurisdiction).

To the extent *Gavagan*'s discussion of FTCA liability has some bearing here since that statute, like the SIAA, incorporates standards of conduct applicable to private parties, *Gavagan* is consistent with the court of appeals' decision in this case. In *Gavagan*, the Fifth Circuit found the Coast Guard liable "not for the failure

* * * to reach a vessel in distress in time," 280 F.2d at 321 (internal quotation marks omitted), but rather for the negligent failure of the Coast Guard employees directing the rescue operation to pass on and evaluate vital information concerning the location of the sinking vessel. *Id.* at 321-325. While the Fifth Circuit did not focus its analysis on the Good Samaritan standard, it did find that the facts in that case "fully [met] the requirements of the Good Samaritan doctrine" because the Coast Guard "'worsen[ed]' the plight of the [shrimp boat's] crew members." *Id.* at 328 (quoting *United States* v. *Lawter*, 219 F.2d 559, 562 (5th Cir. 1955) (Coast Guard is liable when it places the victim "in a worse position than when it took charge")). Because the Fifth Circuit found the Coast Guard liable even under the Good Samaritan standard, any difference in approach between that case and this case would not lead to disparate outcomes.[3]

3. Petitioner is also mistaken in her contention (Pet. 8-11) that the court of appeals' decision conflicts with other decisions of the Ninth Circuit. *Bunting* v. *United States*, 884 F.2d 1143 (1989), did not address the appropriate standard of conduct for the Coast Guard during maritime rescues. Rather, that case involved a suit against the Coast Guard under the FTCA for medical

---

[3] Neither does the court of appeals' decision conflict with the Fifth Circuit's decision in *Coumou* v. *United States*, 107 F.3d 290, amended 114 F.3d 64 (1997). *Coumou* was not a maritime rescue case. Rather, the issue in that case was whether the government breached a duty of care by failing to inform the Haitian government that the captain of the drug-laden vessel it seized was a government informant, thereby resulting in the captain's six-month incarceration in a Haitian jail. In deciding that issue, the *Coumou* court had no occasion to address the appropriate standard for assessing the Coast Guard's conduct during maritime rescues.

malpractice, in connection with emergency medical services rendered on land by a Coast Guard physician. That distinction aside, the court in *Bunting* held that the Coast Guard *was* entitled to the protection of the Alaskan Good Samaritan statute and thus was not liable for less than gross negligence in rendering emergency services, a standard similar to the one applied in this case. See 884 F.2d at 1145-1147.[4] Thus, *Bunting* is fully consistent with the result here.

Similarly, there is no conflict with *Huber* v. *United States*, 838 F.2d 398 (9th Cir. 1988). That case arose out of the loss of a yacht in a storm off the coast of California. The plaintiffs sued the United States and a private party under the SIAA, and the defendants settled. The United States and the private defendant then filed cross-claims for contribution, and it was those claims that the *Huber* court addressed. See 838 F.2d at 399. In so doing, the court did not reach any legal conclusion regarding the appropriate standard of conduct for the Coast Guard under the SIAA.[5]

---

[4] The Alaska Good Samaritan statute eliminates civil liability for emergency aid unless damages are the result of gross negligence, recklessness or intentional misconduct. See *Bunting*, 884 F.2d at 1145-1147.

[5] None of the other cases cited by petitioner involved alleged Coast Guard negligence during a maritime rescue. *Chaffin* v. *United States*, 176 F.3d 1208 (9th Cir. 1999) (FTCA claim resulting from polar bear attack at remote Air Force radar site in Alaska); *Sutton* v. *Earles*, 26 F.3d 903 (9th Cir. 1994) (SIAA claim arising from alleged negligence in failing to warn of an obstruction to navigation); *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985) (SIAA claim arising from alleged negligence in marking obstruction to navigation); *Olympia Sauna Compania Naviera, S.A.* v. *United States*, 670 F. Supp. 1498 (D. Or. 1987) (SIAA liability for negligently implementing grid positioning project and

Even if the court of appeals' decision in this case were in tension with other Ninth Circuit precedents, such intra-circuit conflicts are best resolved by the court of appeals concerned and generally do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

4. Assertions of conflict aside, petitioner incorrectly contends that the Coast Guard was under a statutory obligation in this case to "perform any and all acts necessary to rescue and aid persons and protect and save property." Pet. 16 (quoting 14 U.S.C. 88(a)(1)). Petitioner omits the opening clause of the statutory provision she cites, which makes clear that the Coast Guard is permitted—not required—to undertake such rescues. See 14 U.S.C. 88(a) (providing that the Coast Guard "may" so act).

Moreover, the waiver of sovereign immunity contained in the SIAA does not extend to suits challenging the Coast Guard's discretionary decisions regarding whether to undertake a rescue in the first instance. As the Ninth Circuit has explained, "the Coast Guard, because of its limited resources, [can] not help all ships in distress, and [has] to make a policy judgment to use its resources to help [a particular] ship. This decision [is] a protected discretionary decision" and is not subject to challenge in a suit under the SIAA or PVA. *Arizona Maintenance Co.* v. *United States*, 864 F.2d 1497, 1503 (9th Cir. 1989); see *Good* v. *Ohio Edison Co.*, 149 F.3d 413, 418-419 (6th Cir. 1998) (United States retains its sovereign immunity under the SIAA for "discretionary

---

mis-positioning a Coast Guard buoy, causing a failure to warn mariners of navigational obstructions).

functions"); *Cassens* v. *St. Louis River Cruise Lines, Inc.*, 44 F.3d 508, 511 (7th Cir. 1995); *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1087 (D.C. Cir. 1980); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977).

Accordingly, petitioner's references (Pet. 3, 7, 9) to the total elapsed time between Hansen and Brewer's first radio contact and Brewer's ultimate death are inapposite. The Coast Guard is subject to potential liability only for its conduct in connection with a rescue attempt once it begins to undertake that rescue. See *Huber*, 838 F.2d at 401 (observing that the Coast Guard may not be held liable for its choice of "whether or how to attempt to assist" a vessel in distress). In this case, the interval between the Coast Guard's decision to attempt to help the *Foxtrot* and the rescue vessel's departure from the Coast Guard dock was approximately six and one-half minutes. Pet. App. 10c. Neither the district court's application of the Good Samaritan standard to the Coast Guard's actions during that interval nor its determination that the record contains no evidence capable of supporting a finding of liability under that standard warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
ROBERT S. GREENSPAN
JOHN P. SCHNITKER
Attorneys

JUNE 2000